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Supreme Court U.S.
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No. 02-693

IN THE

Supreme Court of the United States

JOHN M. LAMIE,

Petitioner,

v.

UNITED STATES TRUSTEE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR AMICUS CURIAE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS

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QUESTION PRESENTED

Does Section 330(a)(1) of Title 11, United States Code (the "Bankruptcy Code") authorize a court to award fees to a debtor's attorney?

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BRIEF FOR AMICUS CURIAE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS

This brief is filed on behalf of the National Association of Consumer Bankruptcy Attorneys as amicus curiae in support of petitioners.[1]

INTEREST OF AMICUS CURIAE

The National Association of Consumer Bankruptcy Attorneys ("NACBA"), incorporated in 1992, is a non-profit organization of more than 1,300 consumer bankruptcy attorneys nationwide. Member attorneys and their law firms represent debtors in an estimated 300,000 bankruptcy cases

[1] Letters of consent from both parties have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than amicus curiae or its counsel made a monetary contribution to the preparation and submission of this brief.

filed each year, a significant portion of the over 1.5 million bankruptcy filings each year. NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. Additionally, NACBA advocates nationally on issues that cannot be addressed adequately by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors. NACBA has filed *amicus curiae* briefs in this Court and numerous courts of appeal seeking to protect the rights of consumer bankruptcy debtors. *See Kawaauhau v. Geiger*, 523 U.S. 57 (1998).

ARGUMENT

The court of appeals held that Section 330(a)(1) of the Bankruptcy Code did not authorize a court to award fees to a debtor's attorney. The decision exacerbated a pre-existing circuit split on this question. This Court should grant certiorari to resolve the open and mature circuit split on this issue, which is of significant practical importance.

I. THE PETITION SHOULD BE GRANTED TO RESOLVE AN OPEN, ACKNOWLEDGED, AND MATURE SPLIT IN THE CIRCUITS.

The decision below widens an open, acknowledged and mature split in the courts of appeals. The Third and Ninth Circuits have held that a bankruptcy court may award compensation to debtors' attorneys, notwithstanding the fact that the words "or the debtor's attorney" appear to have been inadvertently omitted from the text of Section 330(a) of the Bankruptcy Code. *In re Top Grade Sausage, Inc.*, 227 F.3d 123, 127-30 (3d Cir. 2000); *In re Smith*, 305 F.3d 1078, 1086-88 (9th Cir. 2002); *In re Century Cleaning Servs., Inc.*, 195 F.3d 1053, 1057-61 (9th Cir. 1999). The Second Circuit, in dicta, has agreed. *In re Ames Dep't Stores, Inc.*, 76 F.3d 66, 71-72 (2d Cir. 1996).

In contrast, the Fourth Circuit below held that counsel for the debtor may not be compensated out of the bankruptcy estate for services provided during the bankruptcy.

In so holding, the Fourth Circuit followed decisions of the Fifth and Eleventh Circuits, *In re Am. Steel Prods., Inc.*, 197 F.3d 1354, 1355-56 (11th Cir. 1999); and *In re Pro-Snax Distribs., Inc.*, 157 F.3d 414, 424-26 (5th Cir. 1998). As the Fourth Circuit acknowledged, its decision "widens the split on this issue with three other circuits." (Pet. App. 2a.)

Only this Court can resolve the conflict among the circuits on the question of whether Section 330(a)(1) of the Bankruptcy Code authorizes a court to award fees to debtors' attorneys. Both the majority and dissenting opinions observed that the decision below creates a 3-2 circuit split on the question presented. As Judge Michael noted in dissent below, there are two "sides" on the question presented (Pet. App. 13a), each of which has been "well developed" in thoughtful opinions of the courts of appeals—not to mention the numerous opinions of the bankruptcy and district courts on this issue.[2] This Court should grant certiorari to resolve the irreconcilable circuit split.

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[2] Following the Third and Ninth Circuits approach: *In re Eggleston Works Loudspeaker Co.*, 253 B.R. 519, 524 (6th Cir. B.A.P. 2000); *In re Bottone*, 226 B.R. 290, 297 (Bankr. D. Mass. 1998); *In re Miller*, 211 B.R. 399, 400-02 (Bankr. D. Kan. 1997); *In re Melp, Ltd.*, 179 B.R. 636, 639 (E.D. Mo. 1995); *In re Taylor*, 250 B.R. 869, 870-71 (E.D. Va. 2000); *In re Brierwood Manor, Inc.*, 239 B.R. 709, 715-16 (Bankr. D.N.J. 1999); *In re Stroudsburg Dyeing & Finishing Co.*, 209 B.R. 648, 650 (Bankr. M.D. Pa. 1997).

Following the Fourth, Fifth, and Eleventh Circuit approach: *In re Ramey*, 266 B.R. 857 (Bankr. S.D. Iowa 2001); *In re Redding*, 242 B.R. 468 (Bankr. W.D. Mo. 1999); *In re Thomas*, 195 B.R. 18 (Bankr. W.D.N.Y. 1996); *In re Freidland*, 182 B.R. 576, 578-79 (Bankr. D. Colo. 1995); *In re Kinnemore*, 181 B.R. 520, 521 (Bankr. D. Idaho 1995); *In re Skinner*, 240 B.R. 225, 227-28 (Bankr. W.D. Va. 1999); *In re Johnson*, 234 B.R. 671, 674-75 (Bankr. S.D. Tex. 1999); *In re Keller Fin. Servs. of Florida, Inc.*, 243 B.R. 806, 817 (Bankr. M.D. Fla. 1999); *In re Fassinger*, 191 B.R. 864, 865 (Bankr. D. Or. 1996).

II. THE QUESTION PRESENTED HAS IMPORTANT PRACTICAL IMPLICATIONS.

The question presented has significant and wide-ranging implications for debtors and their professionals in bankruptcy cases. In a typical Chapter 7 case—whether filed by an individual or a business—a trustee is appointed to administer and oversee the wind-down and liquidation of the bankruptcy estate for the benefit of all creditors. To accomplish an expedient liquidation, Congress imposed certain duties on both the debtor and the trustee.

Section 704 of the Bankruptcy Code provides that:

> The trustee shall—(1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interest of parties in interest; (2) be accountable for all property received . . . (4) investigate the financial affairs of the debtor . . . (8) if the business of the debtor is authorized to be operated, file . . . periodic reports and summaries of the operation of such business . . . .

11 U.S.C. § 704.

Moreover, the debtor has an express statutory obligation to "cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties under this title . . . surrender to the trustee all property of the estate and any recorded information, including books, documents, records and papers, relating to property of the estate . . . ." *Id.* § 521(3) and (4).

The debtor's assistance and cooperation with the trustee is often quite important to the success of the bankruptcy case and the recovery that creditors will receive on account of their claims. For example, in cases in which a small business seeks protection under Chapter 7, it is commonly the case that the most valuable asset of the bankruptcy estate will be business receivables or other causes of action the estate holds against third parties. Counsel for the debtor, who will often have gained an in depth understanding of the debtor's business in the course of preparing the bankruptcy

filing, may be in the best position to assist the trustee in identifying and pursuing these claims.

In addition, in individual debtor cases, many debtors will lack the skills and financial literacy to satisfy effectively their statutory obligations to cooperate with the trustee without the assistance of counsel. Accordingly, it is commonly the case that debtor's counsel will play an essential role in providing these necessary services during the bankruptcy.

The decision below, following the decisions of the Fifth and Eleventh Circuits, holds that debtor's counsel cannot be compensated in bankruptcy for any of this work. By contrast, in the Third and Ninth Circuits, counsel for the debtor may be compensated out of the bankruptcy estate for these services, assuming counsel can otherwise establish that the fees were "reasonable" and the services provided were "actual [and] necessary." *Id.* § 330(a)(1).

As a result of the circuit split on this question, counsel for a debtor in the Fourth, Fifth and the Eleventh Circuits may be disinclined to provide such assistance, whereas debtor's counsel in the Third and Ninth Circuits may be more willing to do so. To address this concern, debtors' counsel in those jurisdictions that refuse to permit post-bankruptcy compensation for actual and necessary services may demand a prepayment or retainer, prior to the bankruptcy, for the work that they anticipate being called upon to perform post-bankruptcy.

The practical consequences are further exacerbated in cases in which a bankruptcy, originally filed under Chapter 11, is later converted to Chapter 7 (*see id.* § 1112(a)), or in which the debtor-in-possession is replaced by the appointment of a Chapter 11 trustee (*see id.* § 1104). In these cases, during the time in which the debtor remains a debtor-in-possession (before the conversion or appointment of a trustee), the debtor has the duties of a trustee, *id.* § 1107, and debtor's counsel may be compensated under Section 330(a) as counsel to the "trustee." The decision below, however, would deprive debtor's counsel of any compensation for

work performed after conversion or the appointment of a trustee. This problem can arise in a variety of cases: small businesses, operating businesses cases or consumer filings. Especially in a complex business case, there is often extensive work that is required of debtor's counsel in the transition period, as the trustee comes to take control of the business. To deprive debtor's counsel of compensation for that work would be quite disruptive to the orderly transition that would best serve the interests of all creditors. Given the sheer volume of bankruptcy filings, this is a matter of tremendous practical importance.

There is no reason to believe that Congress intended such a result. In addition to the many statutory anomalies highlighted in the petition (such as the nonsense the court of appeals' construction would make of Sections 329 and 331—as well as the other provisions of Section 330), the decision below cannot be harmonized with any sound principle of bankruptcy policy. Because of the pernicious real world effect of the acknowledged circuit split on this issue, it is imperative that this Court grant certiorari to resolve this conflict.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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